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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 JOSH THOMAS,

9 Plaintiff,

10 v.

11 MERCHANTS CREDIT ASSOCIATION,

12 Defendant.
13
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NO. C19-1173RSL

ORDER GRANTING IN PART
DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT

15 This matter comes before the Court on “Defendant’s Motion for Summary Judgment,”
16 Dkt. # 13, and “Defendant Merchants Credit Association’s Motion[] for Sanctions Pursuant to
17 Rule 11,” Dkt. # 10. Plaintiff Josh Thomas, on behalf of himself and a class of similarly situated
18 persons, alleges that defendant Merchants Credit Association made false and defamatory
19 statements about him, violated the Washington Consumer Protection Act (“CPA”), and violated
20 the Fair Credit Reporting Act (“FCRA”) when it reported to credit reporting agencies that
21 plaintiff was delinquent on two medical debts. Plaintiff also alleges that defendant violated the
22 FCRA by failing to investigate the debts, failing to communicate with plaintiff, and failing to
23 correct errors once they were brought to its attention. Two days after the case management order
24 was issued, defendant moved for summary dismissal of all of plaintiff’s claims.

25 Summary judgment is appropriate when, viewing the facts in the light most favorable to
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ORDER GRANTING IN PART DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT

1 the nonmoving party, there is no genuine issue of material fact that would preclude the entry of
2 judgment as a matter of law. The party seeking summary dismissal of the case “bears the initial
3 responsibility of informing the district court of the basis for its motion” (*Celotex Corp. v.*
4 *Catrett*, 477 U.S. 317, 323 (1986)) and “citing to particular parts of materials in the record” that
5 show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)). Once the moving
6 party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to
7 designate “specific facts showing that there is a genuine issue for trial.” *Celotex Corp.*, 477 U.S.
8 at 324. The Court will “view the evidence in the light most favorable to the nonmoving party . . .
9 and draw all reasonable inferences in that party’s favor.” *Colony Cove Props., LLC v. City of*
10 *Carson*, 888 F.3d 445, 450 (9th Cir. 2018). Although the Court must reserve for the trier of fact
11 genuine issues regarding credibility, the weight of the evidence, and legitimate inferences, the
12 “mere existence of a scintilla of evidence in support of the non-moving party’s position will be
13 insufficient” to avoid judgment. *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1049 (9th
14 Cir. 2014); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Factual disputes whose
15 resolution would not affect the outcome of the suit are irrelevant to the consideration of a motion
16 for summary judgment. *S. Cal. Darts Ass’n v. Zaffina*, 762 F.3d 921, 925 (9th Cir. 2014). In
17 other words, summary judgment should be granted where the nonmoving party fails to offer
18 evidence from which a reasonable fact finder could return a verdict in its favor. *Singh v. Am.*
19 *Honda Fin. Corp.*, 925 F.3d 1053, 1071 (9th Cir. 2019).

20 Having reviewed the memoranda, declarations, and exhibits submitted by the parties and
21 taking the evidence in the light most favorable to plaintiff, the Court finds as follows:

22 BACKGROUND

23 In September 2017, plaintiff received medical care at Virginia Mason Medical Center
24 which resulted in two separate invoices. In March 2018, Virginia Mason assigned the unpaid
25 balance of both debts to defendant for collection. Defendant sent plaintiff two letters, one for
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1 each debt, indicating that it was attempting to collect amounts owed, providing an opportunity to
2 dispute the debts, and requesting payment. Dkt. # 11-1 at 4 and 44. Plaintiff responded to the
3 notices, indicating that he had insurance and that Virginia Mason had either failed to submit the
4 claims for payment or had improperly submitted the claims. Plaintiff requested that defendant
5 submit claims to his insurer before contacting him again. Dkt. # 11-1 at 6-7 and 46.

6 On April 28th and May 10th, defendant sent two letters, both acknowledging plaintiff's
7 dispute regarding the second, larger debt (Account # 5445833 with a principal amount of
8 \$839.00). Dkt. # 11-1 at 18 and 50.¹ Both letters included the name and address of the creditor
9 and a promise that the debt has been marked "disputed" if it were reported to a credit reporting
10 agency. The second letter enclosed a Virginia Mason Statement of Clinical Services related to
11 Merchants Account # 5425568, the smaller of the two debts: the statement and the letter to
12 which it is attached do not reference the same debt. Dkt. # 11-1 at 19. Following Merchants'
13 lead, plaintiff sent two responsive letters, both regarding the larger of the two debts, Account
14 # 5445833. The first letter noted that defendant had not addressed the substance of his dispute:
15 he reiterated that Virginia Mason had either failed to submit a claim to his insurance carrier or
16 had improperly submitted the claim and that he would be willing to pay any unreimbursed
17 amounts once the claim was adjusted. Dkt. # 11-1 at 52 and 58. The second response, mailed a
18 few days later, keyed in on the Statement of Clinical Services defendant had forwarded with the
19 May 10th letter, arguing that Virginia Mason had written off the debt and therefore no amounts
20 were due. Plaintiff requested that defendant cease all collection efforts. Dkt. # 11-1 at 22.

21 Defendant claims that it reported both debts to Equifax as disputed on July 31, 2018. Dkt.
22 # 11 at ¶¶ 8 and 22. The evidence offered in support of these assertions consists of entries in
23 what appear to be Merchants' internal computerized records stating "07-31-18 05:52PM *crpt

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25 ¹ Contrary to the representations of Merchants' compliance officer, Alexandra Sandoval, at Dkt.
26 # 11 at ¶ 6, the record contains no response to plaintiff's dispute regarding the first, smaller debt
(Merchants Account # 5425568 with a principal amount of \$304.01).

1 account info disputed by consumer under FCRA . . . active bal \$875 dt 1st delq 09262017” and
2 “07-31-18 05:56PM *crpt account info disputed by consumer under FCRA . . . active bal \$319
3 dt 1st delq 09262017.” Dkt. # 11-1 at 66 and 26. While it is not entirely clear what information
4 was sent to Equifax, shortly thereafter plaintiff received an alert from a credit monitoring service
5 letting him know that Merchants had reported delinquent debts and that his credit rating had
6 dropped. Plaintiff asserts that he “saw no indications that Defendant Merchants was reporting the
7 debts as disputed.” Dkt. # 22 at ¶ 12. Plaintiff sent another letter to defendant on August 5, 2018,
8 indicating that the credit reports were erroneous, that Merchants had so far failed to address his
9 dispute on the merits, and that the alleged debt was fraudulent. Dkt. # 22-1 at 2. Plaintiff also
10 notified the credit reporting agencies that the debts were disputed. Dkt. # 22 at ¶ 14.

11 Six months later, Merchants’ internal records entries, state “02-14-19h 11:27a *!ONLINE
12 VERIF, A5425568 VERF BAL EFX 48 pnf PNF” and “02-14-19h 11:27a *!ONLINE VERIF, A
13 5445833 VERF ID EFX 48 pnf PNF.” Dkt. # 11-1 at 13.² Merchants states that these entries
14 show that plaintiff notified Equifax that the two debts were disputed on that date and that he
15 claimed that he was “not liable.” Merchants states that this was its first notice from Equifax that
16 plaintiff had disputed the debts with the credit reporting agency: plaintiff challenges that
17 assertion on the ground that he had disputed the debts with the credit reporting agencies in
18 August 2018.³

19 Toward the end of March 2019, Merchants received a letter from plaintiff’s counsel
20 asserting violations of the FCRA and the CPA and notifying it of plaintiff’s intent to initiate
21 litigation based on a draft complaint attached to the letter unless they were able to settle the
22 matter. Dkt. # 11-1 at 30-31. The next day, Merchants contacted Virginia Mason, requesting that

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24 ² The Court reserves ruling on plaintiff’s hearsay objections.

25 ³ There is no indication in Merchants’ computerized records of a report from the CRA in August
26 2018.

1 it re-bill plaintiff's insurance. Dkt. # 11-1 at 14. What its investigation showed is not clear from
2 Merchants' cryptic computerized records. Taking the evidence in the light most favorable to
3 plaintiff, it appears that Virginia Mason had billed Premiera at the time of service, that the bill
4 was paid and adjusted, and that a \$30 deductible remained outstanding. *Id.*⁴ There are also
5 indications that Merchants was able to prevail upon Virginia Mason to submit the claim to
6 Regence which responded by saying that there was a policy in effect at the time of service but
7 that there was no coverage under the ID and group number provided. Dkt. # 11-1 at 15.

8 On April 5, 2019, Equifax again notified Merchants that plaintiff had disputed the debts.
9 *Id.* Following attorney review of the file, Merchants sent a letter to plaintiff's counsel alerting
10 him that the allegation in the draft complaint that Merchants had "completely ignored" his client
11 was factually incorrect and that Merchants had handled plaintiff's dispute pursuant to company
12 policy, including an investigation and the generation of an appropriate response to plaintiff. In
13 particular, Merchants indicated that it had compared the insurance information plaintiff had
14 provided to Merchants with that in the provider's files. Dkt. # 11-1 at 40.

15 DISCUSSION

16 A. Fair Credit Reporting Act, 15 U.S.C. § 1681s-2

17 Congress enacted the FCRA "to ensure fair and accurate credit reporting, promote
18 efficiency in the banking system, and protect consumer privacy." *Safeco Ins. Co. of Am. v. Burr*,
19 551 U.S. 47, 52 (2007). Section 1681s-2 imposes two responsibilities on "furnishers" of credit
20 information to credit reporting agencies ("CRAs") such as Equifax, TransUnion, and Experian.
21 A furnisher must not only provide accurate information to the CRA in the first instance (15

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23 ⁴ This is not the interpretation provided by Merchants, which interprets "THIS INS WAS
24 BILLED IN 2017. \$30 4.01 IS DEDUCTIBLE PER INSURANCE EOB" to mean "the insurance was
25 billed in 2017 and that balance is insurance deductible." Dkt. # 11 at ¶ 12 and ¶ 26. Plaintiff will be
26 permitted to take discovery regarding what Merchants did, what its investigation showed, and the
meaning of this entry.

1 U.S.C. § 1681s-2(a)), it must also investigate and/or correct inaccurate information (15 U.S.C.
2 § 1681s-2(b)). Plaintiff alleges that Merchants violated both duties.

3 **1. Furnishing Inaccurate Information, 15 U.S.C. § 1681s-2(a)**

4 Plaintiff alleges that Merchants provided inaccurate information to the CRAs. Pursuant to
5 15 U.S.C. § 1681s-2(d), however, only federal and state agencies can enforce the duties imposed
6 under § 1681s-2(a). To the extent plaintiff is asserting a claim under 15 U.S.C. § 1681s-2(a), the
7 claim fails as a matter of law.

8 **2 . Investigation and/or Correction, 15 U.S.C. § 1681s-2(b)**

9 The duty to investigate and correct inaccurate information arises only after the furnisher
10 receives notice of a dispute from the CRA. A complaint received directly from the consumer
11 does not trigger the duty to investigate. *Gorman v. Wolpoff & Abramson, LLP*_, 584 F.3d 1147,
12 1154 (9th Cir. 2009) (the duties imposed under § 1681s-2(b) “arise only after the furnisher
13 receives notice of dispute from the CRA; notice of a dispute received directly from the consumer
14 does not trigger furnishers’ duties under subsection (b).”). After receiving notice of a dispute
15 from a CRA, the furnisher of credit information must:

16 (A) conduct an investigation with respect to the disputed information;

17 (B) review all relevant information provided by the consumer reporting agency. . . ;

18 (C) report the results of the investigation to the consumer reporting agency;

19 (D) if the investigation finds that the information is incomplete or inaccurate,
20 report those results to all other consumer reporting agencies to which the person
21 furnished the information and that compile and maintain files on consumers on a
nationwide basis; and

22 (E) if an item of information disputed by a consumer is found to be inaccurate or
incomplete or cannot be verified after any reinvestigation . . . promptly –

23 (i) modify that item of information;

24 (ii) delete that item of information; or

(iii) permanently block the reporting of that item of information.

25 15 U.S.C. § 1681s-2(b)(1). Although there is no explicit “reasonableness” requirement
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1 enunciated in the text, the Ninth Circuit has determined that the term “investigation” “requires
2 an inquiry likely to turn up information about the underlying facts and positions of the parties,
3 not a cursory or sloppy review of the dispute” and that requiring some degree of careful inquiry
4 is appropriate given the consumer protection goal of the FCRA. *Gorman*, 584 F.3d at 1155. The
5 pertinent question is whether the furnisher’s investigation was reasonable in light of the
6 information it had regarding the nature of the consumer’s dispute.

7 Plaintiff bears the burden of showing that defendant’s investigation was unreasonable.
8 *Gorman*, 584 F.3d at 1157. Although the FCRA requires the CRA to include in the notice of
9 dispute “all relevant information regarding the dispute that the agency has received from the
10 consumer . . .” (15 U.S.C. § 1681i(a)(2)(A)), the CRA in this case apparently utilized an
11 electronic form of communication that, to the uninitiated eye, conveyed little more than a need to
12 verify the balance of Account # 5425568 and plaintiff’s identification with regards to Account
13 # 5445833. Dkt. # 11-1 at 13. If this were all the information Merchants had regarding plaintiff’s
14 dispute, a simple review of documents to confirm the identity of the patient and the outstanding
15 balance might constitute a reasonable investigation. The CRA’s notice was not the only
16 information available to Merchants, however. Plaintiff had been communicating with Merchants
17 for months regarding these debts, asserting that he had insurance but that Virginia Mason either
18 had not submitted a claim or had done so incorrectly. Plaintiff specifically requested that the
19 claims be submitted to his insurer before Merchants attempted to collect from plaintiff. He also
20 expressed confusion regarding the amounts allegedly owed, Virginia Mason’s apparent write-off
21 of the debts, and the services provided. All of this information was in Merchant’s possession
22 when it received notice from the CRA that the debts were disputed.

23 Merchants argues that its investigation and response to the February 14, 2019, notice of
24 dispute from Equifax was reasonable. There is a factual issue regarding the adequacy of
25 Merchants’ investigation. Assuming, for purposes of this motion, that the February 14, 2019,
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1 communication was the first notice Equifax provided of the dispute, Merchants failed to
2 “complete all investigations, reviews, and reports required under” § 1681s-2(b)(1) within the
3 thirty-day period provided by § 1681i(a)(1), in violation of § 1681s-2(b)(2). In fact, it appears
4 that Merchants did nothing in response to the CRA’s notice until it received a letter from
5 plaintiff’s counsel on March 25, 2019. What Merchants did thereafter is unclear from the current
6 record. Ms. Sandoval states that Virginia Mason represented to Merchants that insurance had
7 been billed at the time of service and that the amounts owing on the accounts are insurance
8 deductibles. Dkt. # 11 at ¶¶ 12 and 26. The computerized records cited in support of this
9 statement suggests that the insurance deductible was \$30, far less than either of the debts
10 Merchants had reported. There is no indication that Merchants corrected the information it
11 furnished Equifax if, indeed, the outstanding balance on the debt was only \$30. The Court
12 cannot determine on the current record that, as a matter of law, Merchants’ investigation was
13 reasonable or that it satisfied its obligations under § 1681s-2(b). The Court declines to speculate
14 whether potential failures to comply with the requirements of the FCRA were willful or
15 negligent.

16 **B. Defamation**

17 The FCRA contains two preemption provisions. Section 1681h(e) generally preempts
18 defamation actions against persons who provide certain types of information to a consumer
19 reporting agency except where the false information is furnished with malice or willful intent to
20 injure the consumer. Section 1681t(b)(1)(F) preempts all state requirements or prohibitions (with
21 two exceptions for Massachusetts and California laws not at issue here) related to the
22 responsibilities of persons who furnish information to consumer reporting agencies under
23 § 1681s-2. The interplay between these two preemption provisions has caused confusion. Some
24 courts have concluded that § 1681t(b)(1)(F) preempts all state law causes of action asserted
25 against persons who provide information to CRAs despite the more specific authorization for
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1 defamation suits involving willfulness or malice under § 1681h(e). *Buraye v. Equifax*, 625 F.
2 Supp.2d 894, 900 (C.D. Cal. 2008). Some courts note that Congress amended, rather than
3 repealed, § 1681h(e) when it added § 1681t to the FCRA and therefore give meaning to both
4 sections by interpreting defamation and the other causes of action mentioned in § 1681h(e) as
5 exceptions to the broader immunity provided to furnishers of information by § 1681t(b)(1)(F).
6 *Loomis v. U.S. Bank Home Mortg.*, 912 F. Supp.2d 848, 858-59 (D. Ariz. 2012). Others have
7 recognized a temporal divide, finding that § 1681(b)(1)(F) applies only to causes of action
8 predicated on a furnisher's responses to notice of a dispute, but that causes of action arising
9 before that point in time are governed by § 1681h(e). *Kane v. Guar. Residential Lending, Inc.*,
10 2005 WL 1153623, at *8 (E.D.N.Y. May 16, 2005). The Ninth Circuit, for its part, noted the
11 tension between the two sections and simply declined to decide the matter, instead evaluating
12 whether plaintiff had shown willfulness or malice and finding that the state law claim failed in
13 any case. *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1166-67 (9th Cir. 2009).

14 The language of the statute and its legislative history suggests that Congress did not
15 intend to repeal § 1681h(e) *sub silentio* when it added § 1681t to the FCRA. Congress had a
16 clear opportunity to delete § 1681h(e) if it had wanted to: it did not, and the provisions of the
17 two sections are sufficiently distinct that they can be interpreted to apply to different conduct
18 and claims. As the Fourth Circuit has pointed out, § 1681h(e) applies only where a defamation
19 claim is "based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this
20 title, or based on information disclosed by a user of a consumer report." *Ross v. F.D.I.C.*, 625
21 F.3d 808, 814 (4th Cir. 2010). Plaintiff's claims do not arise out of Merchants' disclosures to
22 consumers (§ 1681g and h) or Merchants' use or disclosure of information contained in a
23 consumer report (§ 1681m and h(e)). Thus, plaintiff's defamation claim does not fall within the
24 scope of § 1681h(e), and the only preemption provision that applies is § 1681t(b)(1)(F). Because
25 plaintiff's defamation claim is a requirement or prohibition imposed under state law with respect
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1 to subject matter regulated under Section 1681s-2, his claim “runs into the teeth of the FCRA
2 preemption provision” and is barred. *Ross*, 625 F.3d at 813.

3 **C. Class Allegations**

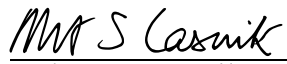
4 Plaintiff has not responded to Merchants’ argument regarding his inability to certify a
5 class given the facts of this case.

6 **D. Motion for Sanctions Under Rule 11**

7 Merchants’ motion for sanctions under Rule 11 was procedurally improper insofar as it
8 was emailed to plaintiff’s counsel twenty-one days before filing rather than “served under Rule
9 5” as required by subsection (c)(2) of the Rule. Having reviewed the materials submitted by the
10 parties with regards to both the summary judgment motion and the motion for sanctions, it is
11 clear that plaintiff’s class allegations were frivolous, unreasonable, and asserted for an improper
12 purpose, but he has now withdrawn those allegations and abandoned all class claims. No
13 sanctions are appropriate given defendant’s procedural failure.

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15 For all of the foregoing reasons, plaintiff’s claim under 15 U.S.C. § 1681s-2(a), his claims
16 for defamation and violations of the CPA,⁵ and his class allegations fail as a matter of law.
17 Merchants’ motion for summary judgment regarding plaintiff’s claim under 15 U.S.C. § 1681s-
18 2(b)(1) is DENIED.

19
20 Dated this 25th day of March, 2020.

21 
22 Robert S. Lasnik
23 United States District Judge

24
25 ⁵ Plaintiff concedes that his claim under the Washington Consumer Protection Act is preempted
26 by the FCRA. Dkt. # 21 at 16 n. 49.